Date: 20070710

Docket: IMM-2817-06

Citation: 2007 FC 733

Ottawa, Ontario, July 10, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

LEONILDO ALBERTO PACHECO SILVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] Mr. Alberto Pacheco Silva (the Applicant) seeks judicial review of a decision of a Visa Officer (the Officer) dated April 24, 2006, wherein the Officer determined that the Applicant did not meet the requirements for immigration to Canada as a permanent resident under the skilled worker class.

[2] The Applicant, who entered Canada as a visitor in or about December of 2000 was, at the date of his application, in possession of a work permit valid until October 26, 2005. He applied for permanent resident status December 10, 2004. The Applicant claimed to have had work experience in the occupations of Baker and Retail Trade Supervisor. In his submissions, he acknowledged that even if he were awarded 55 points, the number of units he believed he merited, this would still fall short of the 67 units required for the issuance of a permanent resident visa. In fact, the Officer awarded the Applicant 57 points. In his application letter, the Applicant consequently requested a “substituted evaluation” under subsection 76(3) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations).

2. The Decision

[3] The Officer in her decision letter indicated that she was not satisfied from the information on file that the Applicant had met the following requirements of subsection 75(2) of the Regulations:

> (a) within ten years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment (37.5 hours/week) experience, or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type O Management Occupations or Skill Levels A or B of the National Occupational Classification Matrix;
>
> (b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and
>
> (c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the

> occupational descriptions of the National Occupational Classification, including all of the essential duties.

[4] The Officer further found that even if the Applicant had achieved the experience required pursuant to subsection 75(2), he still would not have satisfied the selection criteria. The Officer then considered the request for the substituted evaluation pursuant to subsection 76(3) of the Regulations and determined that the application did not merit such a recommendation. The Officer found that the units of assessment are an accurate indication of the Applicant's prospects for becoming successfully established in Canada.

3. Issues

[5] There is no dispute as to the number of units of assessment awarded by the Officer. The Applicant takes issue with the Officer's finding that the units assessed were an accurate indication of his prospects for becoming established in Canada. The Applicant argues that the Officer exercised her discretion in a capricious manner without due regard to the evidence in determining that the units of assessment assigned were an accurate indication of the Applicant's prospects of becoming established in Canada. The Applicant further contends that the Officer breached the requirements of procedural fairness in exercising her discretion.

4. Standard of review

[6] The standard of review applicable to a Visa Officer's decision was considered by my colleague Justice Richard Mosley in *Hassani v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1283, [2006] F.C.J. No. 1597 (QL). I am in agreement with the learned judge's review of the case authorities including the views expressed by Mr. Justice Yves de

Montigny in *Svetlana Vladimirovna Kniazeva v. Canada (Minister of Citizenship and Immigration)* 2006 FC 268. At paragraph 15 of his reasons for decision, the learned judge dealt with the applicable standard of review of a visa officer's decision in an application for permanent residence under the Federal Skilled Worker Class:

> …This Court has consistently held that the particular expertise of visa officers dictates a deferential approach when reviewing their decisions. There is no doubt in my mind that the assessment of an Applicant for permanent residence under the Federal Skilled Worker Class is an exercise of discretion that should be given a high degree of deference. To the extent that this assessment has been done in good faith, in accordance with the principles of natural justice applicable, and without relying on irrelevant or extraneous considerations, the decision of the visa officer should be reviewed on the standard of patent unreasonableness: *Postolati v. Canada (M.C.I.)*, 2003 FCT 251; *Singh v. Canada (M.C.I.)*, 2003 FCT 312; *Nehme v. Canada (M.C.I.)*, 2004 FC 64; *Bellido v. Canada (M.C.I.),*2005 FC 452, [2005] F.C.J. No. 572 (QL).

[7] In determining the applicable standard of review, it is important to consider the nature of the question under review. Here the first question before the Court deals with the exercise of the Officer's discretion in considering a "substituted evaluation" under subsection 76(3) of the Regulations. I adopt the view that the particular expertise of Visa Officers dictates a deferential approach when reviewing such a decision. The assessment of an applicant for permanent residence under the Federal Skilled Worker Class and a "substituted evaluation" under subsection 76(3) are discretionary decisions involving factual findings that should be given a high degree of deference. Such decisions should be reviewed on the standard of patent unreasonableness.

[8] The second question involves procedural fairness. It is well accepted that questions of procedural fairness require no assessment of the standard of review. Decisions involving a breach of procedural fairness are not entitled to any deference on judicial review.

5. Analysis

[9] The Applicant concedes that the number of units of assessment claimed (55) and awarded (57) falls short of the number required (67) for the issuance of a permanent resident visa. He nevertheless maintains that the units of assessment awarded are not an accurate reflection of his prospects of becoming successfully established in Canada. The Applicant contends that the Officer erred in assessing the Applicant's work experience and adaptability and argues that the Officer breached the rules of procedural fairness by failing to give him an opportunity to respond to concerns raised. The Applicant argues that the Officer's decision is contrary to the evidence before him and based on the record, a patently unreasonable decision. As a consequence, the Applicant argues that the decision should be quashed. I will now consider, in turn, the two issues raised by the Applicant.

A. *Did the Officer err in the exercise of his discretion*?

[10] A review of the Officer's CAIPS notes indicates that she assigned the Applicant zero units for education, six units for language skills based on an International English Language Test System (IELTS) test and zero units for French. In total, for these categories, the Officer assigned two more units than the number of units suggested by counsel for the Applicant. The Applicant takes issue with the Officer's treatment of the evidence in respect to the Applicant's work experience, arranged employment and adaptability under the spouse's education or study.

[11] With respect to work experience, the Applicant listed several occupations with different employers in Ponta Delgada, Portugal, for the period September 1988 to December 2000. These included “Pastry Baker”, “Pastry Cook” and “Supervisor”. In Canada, he indicated that he had been unemployed from December 2000 to October 2001 and that he worked as a baker at Silva’s Portuguese Bakery in Cambridge, Ontario, from October, 2001 to the “present”, the date of his application, May 25, 2004.

[12] The Applicant contends that the Officer erred in finding insufficient the two letters from the Applicant’s employer, one from the employer in Portugal, the other from the employer in Canada. The Applicant argues that the Officer failed to explain why the letters were insufficient. On their face, the Applicant states that the letters establish that he has in excess of four years experience.

[13] The Respondent argues that the letters at issue contained very little information about the Applicant’s work experience. The letter from Portugal did not contain a job description or even a job title, contrary to the instructions he had received with his application for permanent residence. The letter from the employer from Canada dated March 29, 2004, provided the following information:

> Mr. Leanildo Silva of 36 Northview Heights Cambridge Ontario sin no. 915 579 856, has been an employee of Silva’s Portuguese Bakery Since Oct 2001. Mr. Silva occupies the position of assistant Pastry Chef. His responsibilities include the mixing and formation of our Portuguese Pastries. He oversees this process and helps with the cooking of the Pastries. Mr. Silva also assists the Bread Bakers

> and is responsible for working the ovens in order to cook the bread. Mr. Silva's current monthly wages are 3,212.00 gross. If any further information is required please call at the above number.

[14] The Officer noted that the Applicant presented no other evidence of his work experience. The Officer further noted that the Applicant's Canadian employer had the same surname as the Applicant and noted that the employer could be a relative. This raised concerns about whether the Applicant had achieved the experience he claimed. As a result, the Officer determined that Mr. Silva had not produced credible evidence of employment in Canada and assigned him zero units of assessment for experience.

[15] With respect to arranged employment, the Officer's CAIPS notes simply show that no units of assessment were awarded.

[16] The Officer concluded that even if the Applicant had been able to provide information to satisfy her that he had achieved four years of experience and that he should be credited with units of assessment for arranged employment, for French skills and for adaptability, the assessment would still be significantly less than the minimum required to meet the selection criteria. The Officer therefore concluded that no purpose would be served in having the Applicant address the categories for which she expressed concerns.

[17] The Officer's discretion under subsection 76(3) of the Regulations is "residual in nature, and should be decisive only in cases that present unusual facts, or where the Applicant has come close to obtaining [the required] units of assessment." See *Chen v. Canada (Minister of*

Citizenship and Immigration), (1999) F.T.R. 78 at page 83. Here, there is nothing unusual about the facts of the case and the Applicant did not come close to obtaining the required number of units. Even if I were to find that the Officer's assessment of the Applicant's work experience was unreasonable, crediting the Applicant with the maximum number units for work experience, arranged employment and adaptability would still not bring him close to the number of units required. Accordingly, any such error committed by the Officer in assessing the application would not be material to the outcome. See *Patel v. Canada (M.C.I.)*, 2002 FCA 55.

[18] Upon considering the totality of the evidence, I find the Officer's exercise of discretion in conducting the "substituted evaluation" cannot be characterized as arbitrary or capricious. In the circumstances, the Officer's decision is not unreasonable.

B. *Did the Immigration Officer breach the requirements of procedural fairness?*

[19] The Applicant contends that the Officer breached the principles of procedural fairness by failing to provide reasons for rejecting evidence of the Applicant's work experience, by rejecting evidence of adaptability on the basis that there was no attestation from a translator for the relationship, by failing to offer the Applicant the opportunity to respond to a positive labour market opinion, and by failing to either investigate by requesting information in writing or interviewing the Applicant to ascertain the degree of establishment at the time that she was rendering her decision.

[20] I am of the view that the principles of procedural fairness have not been breached in the circumstances of this case. The onus is on the Applicant to provide all relevant supporting documentation and sufficient credible evidence in support of his application. In her decision letter, the Officer clearly stated that the Applicant had not discharged this onus. It is for the Applicant to put his best case forward. See *Lam v. Canada (M.C.I.)* (1998) 152 F.T.R. 316 (T.D.). The onus does not shift to the Officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included. Here, there was no obligation on the Officer to gather or seek additional evidence or make further inquiries.

6. Conclusion

[21] This is a case where the Applicant fell far short of the minimum required for admission to Canada as a permanent resident under the Skilled Worker Class. The Officer considered the Applicant's request for the exercise of subsection 76(3) discretion. In the circumstances, the Officer's decision not to exercise her discretion was not unreasonable. In deciding as she did, the Officer did not breach the principles of procedural fairness.

[22] For the above reasons, the application for judicial review will be dismissed.

[23] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question

ORDER

THIS COURT ORDERS that:

1. The judicial review of a decision of a visa Officer dated April 24, 2006, is dismissed.

2. No question of general interest is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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